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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, APPELLANT

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

ON APPEAL FROM THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Section 685 of the California Insurance Code violates the Equal Protection Clause of the Fourteenth Amendment by subjecting appellant, an Ohio insurance company, to higher taxes than are imposed upon California insurance companies because Ohio, without distinction between foreign and domestic companies, imposes higher taxes upon insurance companies than California imposes upon domestic insurance companies.

2. Whether Section 12241 of the California Revenue and Tax Code violates appellant's Fourteenth Amendment right to equal protection of the laws by denying to appellant because it is an out-of-state insurance company, a substantial part of the credit against its premium taxes, in the amount of the real estate taxes on its principal office in California, that would otherwise be allowable to an in-state insurance company.

3. Whether the California tax statutes imposing heavier taxes on out-of-state insurance companies than upon domestic insurance companies unconstitutionally discriminate against interstate commerce.

4. Whether the McCarran-Ferguson Act, 15 U.S.C. 1011-1015, authorizes California's statutory discrimination against interstate commerce.

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This brief is submitted to supplement the brief filed in response to the Court's invitation of May 12, 1980.

OPINIONS BELOW

The order of the trial court and its Memorandum of Intended Decision and Conclusions of Law (J.S. App. 1a-24a) are not officially reported. The opinion of the Court of Appeal (J.S. App. 27a-36a) prior to its modification (J.S. App. 35a-36a) is reported at 99 Cal. App. 3d 410, 159 Cal. Rptr. 539. The order of the Supreme Court of California denying hearing (J.S. App. 36a) is unreported.

JURISDICTION

The judgment of the Court of Appeal in favor of the validity of provisions of the Constitution and statutes of the State of California, the validity of which were drawn in question on the ground of repugnance to the Constitution of the United States, was entered on November 2, 1979 (J.S. App. 27a). The Court of Appeal denied a petition for rehearing on November 28, 1979 (J.S. App. 35a-36a). The Supreme Court of California denied a petition for hearing on December 27, 1979 (J.S. App. 36a). The notice of appeal to this Court was filed on February 11, 1980 (J.S. App. 37a-38a), and the Jurisdictional Statement was filed on March 13, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). This Court noted probable jurisdiction on October 6, 1980.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause) provides: "The Congress shall have Power * * * To regulate com-

merce with foreign Nations, and among the several States, and with the Indian Tribes."

Amendment XIV, Section 1 of the United States Constitution provides: "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State * * * deny to any person within its jurisdition the equal protection of the laws."

The relevant provisions of the McCarran-Ferguson Act, 15 U.S.C. 1011-1013, are as follows:

> § 1011. *Declaration of Policy*—Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> § 1012. *Regulation by State Law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948* —(a) The business of insurance and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 1013. *Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation*—(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act [15 U.S.C. 41 et seq.], and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

The relevant provisions of the Constitution and statutes of the State of California are set forth in J.S. App. 41a-46a.

STATEMENT

1. Appellant brought this action in the Superior Court of the State of California for the County of Los Angeles to recover California taxes that it had paid under protest for the period 1965-1971.

The facts were stipulated (J.S. App. 3a-4a) and may be summarized as follows: Appellant is an Ohio mutual life and disability insurance company, and has its principal office in that State. It qualified to do business in California in 1956. Pursuant to Section 701 of the Cal. Ins. Code (West 1972), appellant was issued a Certificate of Authority for an indefinite term [1] on July 1, 1956. Appellant has conducted a

[1] Section 701 of the Cal. Ins. Code (West 1972) provides that a certificate of authority "shall be for an indefinite term and shall expire with the expiration or termination of a corporate existence of the holder thereof."

life and disability insurance business in California continuously since the issuance of its Certificate of Authority. Prior to 1965, appellant constructed an office building on land it owned in Los Angeles, and established its principal California office in that building. It has continued to maintain its principal California office in that building, but leases approximately 76% of the space in the building to tenants not related to its operations (J.A. App. 4a, 29a).

a. Pursuant to Sections 12201, 12202, and 12221 of the Cal. Rev. & Tax. Code (West 1970), California imposes upon every insurer doing business in the State, with exceptions not here relevant, an annual tax at a rate slightly in excess of 2.3% of gross premiums, less return premiums, received by the insurer upon business done in the State. Section 12204 of the Cal. Rev. & Tax. Code (West 1970) provides that this gross premiums tax is, with stated exceptions, "in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property." Among the stated exceptions are taxes upon insurance companies' real estate and the so-called retaliatory tax authorized by Article XIII, Section 14-4/5(f)(3) of the California Constitution and imposed by Section 685 of the Cal. Ins. Code (West 1972) (J.S. App. 41a-43a). This latter provision applies to the case of an insurer doing business in California, but incorporated in another state, where the state of incorporation would (even though without differentiation between domestic and out-of-state insurers) impose upon California insurers doing business in that state a greater aggregate of taxes and fees, than California would impose upon insurers of the other state doing business in California. In these circumstances, the California retaliatory tax requires that insurers

incorporated in the other state pay (in addition to the tax otherwise imposed) an additional amount to bring the aggregate of taxes and fees payable to California up to the total amount that would have been payable to the other state.[2]

Acting under Section 685 of the Cal. Ins. Code, the State Board of Equalization issued against appellant a retaliatory tax assessment of $128,214.90 for 1965, and lesser amounts for the succeeding years through 1971, all of which appellant paid under protest.[3] It was stipulated that Ohio does not impose upon California insurers doing business in Ohio greater taxes, fees, etc. than upon domestic insurers doing business

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[2] Prior to 1965, this so-called retaliatory tax was imposed upon out-of-state insurers doing business in California only if their state discriminated against California insurers doing business in that other state. In 1964, however, the California Constitution was amended, and, since 1965, California has imposed the so-called retaliatory tax upon out-of-state insurers doing business in California simply because the level of taxation in their home state, undifferentiated though it might be between domestic and out-of-state insurers, was higher than the level of taxation upon insurers in California. See *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 4 Cal. App. 3d 21, 84 Cal. Rptr. 88 (1970); *Atlantic Ins. Co.* v. *State Board of Equalization*, 255 Cal. App. 2d 1, 62 Cal. Rptr. 784 (1967); *Franklin Life Ins. Co.* v. *State Board of Equalization*, 63 Cal.2d 222, 404 P. 2d 477, 45 Cal. Rptr. 869 (1965).

[3] The retaliatory tax is computed as an amount in excess of the premiums tax. The amount of the premiums tax is also in contest for 1966-1971 (see *infra*, page 6). Hence, the amounts of the two taxes for the years after 1965 are not separately designated. The aggregate amount in issue is $977,853.57, plus interest. (J.S. App. 24a, 26a.)

in Ohio, and the trial court so found (J.S. 6, n. 2; J.S. App. 10a, 21a).[4]

b. Section 12241(a) of the Cal. Rev. & Tax. Code (West 1970) allowed to an insurer a credit against the annual premiums tax equal to the real estate taxes paid for the same year on real property owned by it on which was located its home office or principal office in the state.[5] In accordance, however, with an amendment to Article XIII, Section 14-4/5(e) of the California Constitution adopted in 1966, Section 12241(b) provided thereafter that where a portion of the real property constituting the home or principal office was occupied by any person or persons other than the insurer, the credit allowed by Section 12241(a) was proportionately reduced. This reduction in the credit, however, was not applicable to insurers organized under the laws of California before December 31, 1966. As a result of those statutory provisions, appellant's credit against its premiums taxes was reduced by approximately 76% for the years in issue, while similarly-situated California insurers suffered no reduction at all in their credit.

2. Appellant paid both the retaliatory tax assessments for 1965-1971 and the additional premiums taxes for 1966-1971 under protest, the latter because of the reduced "principal office" credit (J.S. App. 3a-4a). It thereafter filed claims for refund of retaliatory taxes and the amount of the premiums taxes paid under protest, and, when those claims were denied, brought this action for refund of the taxes in

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[4] See also *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 4 Cal. App. 3d 21, 84 Cal. Rptr. 88 (1970).

[5] The provision allowing this credit was repealed in 1976, effective January 1, 1977 (J.S. App. 16a).

issue in the Superior Court for the County of Los Angeles.

The Superior Court entered judgment in favor of appellant for the full amount of the refunds sought, plus statutory interest (J.S. App. 24a, 26a). It held that in discriminating against corporations engaged in interstate commerce and in favor of domestic corporations, both the retaliatory tax and the limits on the "principal office" credit violated the Commerce Clause and appellant's rights to due process and equal protection as guaranteed by the Fourteenth Amendment. The court also held that the California retaliatory tax was not authorized by the McCarran-Ferguson Act, 15 U.S.C. 1011-1015 (J.S. App. 3a-24a).

The Court of Appeal reversed (J.S. App. 27a-34a). It held that the retaliatory tax was authorized by the McCarran-Ferguson Act (J.S. App. 30a-31a). On the authority of its earlier decision in *Atlantic Ins. Co.* v. *State Board of Equalization*, 255 Cal. App. 2d 1, 62 Cal. Rptr. 784 (1967), the court held that the retaliatory tax did not violate either the Commerce Clause or appellant's right to equal protection of the laws under the Fourteenth Amendment (J.S. App. 32a-33a). The court stated with respect to its *Atlantic Ins. Co.* decision, "Right or wrong, we feel impelled to follow it in the case before us" (J.S. App. 33a). Finally, the Court of Appeal ruled that it did not have to address the limits on the "principal office" credit allowed out-of-state insurers because to the extent that appellant's premiums tax was reduced, its retaliatory tax would be increased (J.S. App. 33a-34a). The Court of Appeal denied a petition for rehearing (J.S. App. 35a-36a), and the Supreme Court of California denied appellant's petition for hearing (J.S. App. 36a).

SUMMARY OF ARGUMENT

1. The California retaliatory tax upon out-of-state insurance companies such as appellant violates the Equal Protection Clause of the Fourteenth Amendment and is inconsistent with the limitations imposed upon the states by the Commerce Clause. Here, appellant is subject to the California retaliatory tax solely because Ohio, its state of incorporation, imposes upon insurers, though in completely evenhanded fashion, a somewhat higher level of tax than does California. As this Court has pointed out, the Constitution does not contemplate the economic warfare of reprisal and retaliation among the states. *A&P Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976). Thus, the decisions of this Court have consistently struck down such discriminatory taxes as violative of the Equal Protection Clause of the Fourteenth Amendment. *E.g.*, *WHYY* v. *Glassboro*, 393 U.S. 117 (1968). The considerations that underlay those decisions require reversal of the judgment below.

2. Contrary to the reasoning of the Court of Appeal, the McCarran-Ferguson Act does not save the constitutionality of this tax. All that Act accomplished was to permit the states to regulate the business of insurance. The legislative history clearly states that Congress did not intend to grant to the states any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Accordingly, the McCarran-Ferguson Act should not be construed to sanction the barrier of economic protectionism California seeks to erect here.

Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946), is not to the contrary. In upholding a South

Carolina premiums tax, the Court's emphasis in that case was to affirm Congress' power to authorize the states to regulate insurance. The particular details of the McCarran-Ferguson Act were not considered by the Court. Moreover, the Court "express[ed] no opinion concerning the validity of any feature of these statutes not substantially identical with those of the South Carolina tax dealt with herein" (328 U.S. at 431-432 n.40). Hence, the decision in that case does not speak to the constitutionality of the retaliatory taxes at issue in this case.

ARGUMENT

The California tax statutes at issue in this case violate the Equal Protection Clause of the Fourteenth Amendment, and are inconsistent with the limitations imposed upon the States by the Commerce Clause. As this Court has held in *State Bd. of Ins.* v. *Todd Shipyards*, 370 U.S. 451 (1962), the McCarran-Ferguson Act, 15 U.S.C. 1011-1015, does not relax the limitations that the Fourteenth Amendment imposes upon the States. And that Act should not be construed to authorize state action hostile to, and discriminatory against, out-of-state insurers engaged in interstate commerce in the manner of the California statutes.

1. Appellant qualified to do business in California in 1956. Since that time, it has held an indefinite license, coterminous under California law with its corporate existence, to do business as a life and disability insurer. Accordingly, the annually recurrent taxes here in question have none of the character of an entrance fee imposed upon a foreign corporation as a condition of admission to conduct business in the state, of the type that the Court has upheld. See *WHYY* v. *Glassboro*, 393 U.S. 117, 119 (1968). On

the contrary, the so-called retaliatory tax imposed by Section 685 of the Insurance Code, and the limitation on the "principal office" credit against the premiums tax imposed by Section 12241(b) of the Revenue and Taxation Code, are recurrent burdens imposed upon appellant because it is a foreign corporation—domestic insurers are subject to neither. Indeed, appellant is subject to the retaliatory tax solely because Ohio, its state of incorporation, imposes upon insurers, though in completely evenhanded fashion, a somewhat higher level of taxation than does California.

We submit that California has no legitimate interest in Ohio's level of taxation or fiscal structure when no discriminatory action against California citizens or corporations is involved. Cf. *Toomer* v. *Witsell*, 334 U.S. 385, 395-407 (1948). The several states have different resources, populations, social and economic conditions, levels of public services, fiscal structures, methods and sources of raising revenue, and tax burdens, both in gross and per capita. With respect to other states, where no discriminatory or hostile action is involved, the states are largely autonomous in these matters. And even if another state has engaged in discriminatory action, the Constitution, as this Court has pointed out, does not contemplate the economic warfare of reprisal and retaliation. *A&P Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976).

Since Ohio does not in fact discriminate against California or other out-of-state insurers, there is no greater justification for the tax imposed by Section 685 of the Insurance Code than there would be if California imposed upon Ohio residents who happened to own land in California a higher property tax than was otherwise imposed simply because the level of real property taxation was higher in Ohio

than in California. Section 685 and the limitation upon the "principal office" credit mandated by Section 12241(b) of the Revenue & Taxation Code [6] constitute tax burdens imposed upon foreign corporations because they are foreign corporations. The decisions of this Court have consistently struck down such discriminatory taxation as violative of the Equal Protection Clause of the Fourteenth Amendment. *E.g.*, *WHYY* v. *Glassboro*, 393 U.S. 117 (1968); *Reserve Life Ins. Co.* v. *Bowers*, 380 U.S. 258 (1965); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949); *Hanover Fire Ins. Co.* v. *Harding*, 272 U.S. 494 (1926); *Southern Ry.* v. *Greene*, 216 U.S. 400 (1910). The considerations that underlay those decisions require reversal of the judgment below.

2. Throughout the history of this Court's decisions involving state taxation of interstate commerce, there have been "some firm peaks of decision which remain unquestioned." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959). "Among these is the fundamental principle that * * *: No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.' " *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977). There, the Court held that the State of New York could not impose a tax "to favor local commercial interests over out-of-state businesses," even though the discrimination was "between two types of inter-

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[6] If, as we believe, Section 685 of the Insurance Code is unconstitutional, it is no longer possible to avoid, as did the Court of Appeal, passing upon the constitutionality of the discriminatory aspects of the "principal office" credit limitation imposed by Section 12241(b) of the Revenue and Taxation Code.

state transactions" (429 U.S. at 335). Only last Term, the Court applied the same criteria in striking down, under the Commerce Clause, a Florida statute that prohibited an out-of-state bank holding company from owning or controlling a business furnishing investment advisory services to the general public. *Lewis* v. *BT Investment Managers, Inc.*, No. 79-45 (June 9, 1980). As the Court there observed, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected," quoting from *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

Judged by these standards, the California statutes here in question would appear, if standing alone, to be inconsistent with the Commerce Clause, and the could below did not assert otherwise. The only remaining question is whether the McCarran-Ferguson Act should be construed to permit the "simple economic protectionism" exemplified by the California statutes involved in the case.

We think not, and submit that the history and purpose of the McCarran-Ferguson Act demonstrate that it should not. But we start with a more fundamental premise. As the Court pointed out in *Boston Stock Exchange*, quoting from earlier decisions, "'[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States'" (429 U.S. at 328). See also *Freeman* v. *Hewit*, 329 U.S. 249, 253 (1946). An Act of Congress should therefore not be construed to frustrate that purpose unless by its explicit terms the legislation authorizes the practice of economic protectionism by the States.[7] Indeed, on several occasions, this Court

[7] "The other relevant canon of construction that comes into play is that when a statute is ambiguous, 'construction should

Sherman Antitrust Act, 15 U.S.C. 1 and 2. Many people professed to believe that the decision effectively immunized multi-state insurers, and a large part of the business of insurance, from state regulation and from state taxation. That such a belief was greatly overdrawn was demonstrated not only by the Court's subsequent decision in *Robertson* v. *California*, 328 U.S. 440 (1946), but also by the contemporaneous treatment of interstate carriers and of manufacturers, wholesalers, and others engaged in interstate commerce on a large scale. Congress, nevertheless, felt impelled to act. The reason for action and the intended scope of action are well described in the Report of the House Committee on the Judiciary, H.R. Rep. No. 143, 79th Cong., 1st Sess. 2-3 (1945), as follows:

> Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case*, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.
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> * * * Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters*

has declined to construe federal statutes to permit state action that would have excluded or discriminated against out-of-state competition, even where the federal statute authorized state regulation. *Lewis* v. *BT Investment Managers, Inc.*, No. 79-45 (June 9, 1980), slip op. 16-21; *Hood & Sons* v. *Du Mond*, 336 U.S. 525, 540-545 (1949); *Scott* v. *Donald*, 165 U.S. 58, 100 (1897). And where the Court upheld earlier federal legislation that reinforced or authorized state restrictions on the sale of interstate goods, the Court was careful to point out that the restrictions were nondiscriminatory. *Ky. Whip & Collar Co.* v. *Illinois Central R.R.*, 229 U.S. 334, 351 (1937); *Whitfield* v. *Ohio*, 297 U.S. 431, 439-440 (1936).

3. The McCarran-Ferguson Act was passed in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).[8] In that case, the Court held that multi-state insurers were engaged in commerce among the several States, and were subject to the provisions of the

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go in the direction of constitutional policy.'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974). See also, *e.g.*, *Watts* v. *United States*, 394 U.S. 705, 708 (1969); *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 155-156 (1946).

[8] This Court has examined the legislative history of the McCarron-Ferguson Act in a substantial number of cases. It has never suggested, however, that the terms of the Act could be construed to authorize the discriminatory type of tax upheld by the court below. See also pages 16-17 & note 11, *infra*. *See, e.g., Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979); *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978); *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969); *State Bd. of Ins.* v. *Todd Shipyards*, 370 U.S. 451 (1962); *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960); *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959); *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958); *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409 (1954); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946).

case, will subject insurance executives to both civil and criminal actions for misappropriation of company funds.

* * * * *

It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case [emphasis supplied].

The pertinent Senate report, S. Rep. No. 20, 79th Cong., 1st Sess. (1945), is basically to the same effect. In presenting the Conference Report to the Senate, Senator McCarran read from the Report of the House Judiciary Committee, and added, "[i]n other words, we give to the States no more powers than those they previously had, and we take none from them." 91 Cong. Rec. 1442 (1945).

The congressional debate (91 Cong. Rec. 478-488, 1085-1094, 1396, 1442-1444, 1477-1489 (1945)) principally concerned antitrust legislation—whether it should be displaced by state legislation, suspended, partially suspended, restored after a period of suspension, etc.[9] The uncertainties of state taxation of insurance companies are mentioned from time to time, but rarely more than briefly.[10] Typical was Representative Springer's remark that the pending

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[9] Sections 2 and 3 of the Act, 15 U.S.C. 1012 and 1013, embody the compromises that were reached after extended discussions.

[10] For example, Representative Walter reported to the House that the Attorney General of North Carolina had ruled that the State could no longer collect taxes paid by insurance companies. See 91 Cong. Rec. 1085 (1945).

measure would allow the states "to collect the taxes now permitted—all without Government interference." 91 Cong. Rec. 1092 (1945). See also, *e.g.*, 91 Cong. Rec. 482 (1945) (Senator Radcliffe, "the right of the States * * * to collect taxes should not be terminated"). There is nothing explicit in the debate, the committee reports, or the terms of the statute that suggests that the states were given authority to erect barriers of economic protectionism. Insofar as state taxes were concerned, Congress was aware that current state revenues were in jeopardy of interruption, and intended to remove that hazard and uncertainty. Nothing suggests that Congress ever considered, or that the states were in fact given, enhanced authority to exclude, or to interfere with, competition by out-of-state insurers. Cf. *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 412-413 (1954).

Moreover, this Court's decisions under the McCarran-Ferguson Act have not in other respects construed the Act to sanction anticompetitive arrangements.[11] There is no reason why the McCarran-Ferguson Act should be construed to permit what had never been countenanced prior to the *South-Eastern Underwriters* decision, *viz.*, anti-competitive state taxation that discriminates against out-of-state insurers. In passing the McCarran-Ferguson Act, Congress intended to do nothing more than to "turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459

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[11] See, *e.g.*, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979); *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978).

(1969). See also *id.* at 458-460. In short, the McCarran-Ferguson Act does not sanction the California retaliatory taxes at issue here.

4. *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946), principally relied upon by the court below (J.S. App. 31a-32a), is not to the contrary. There, the Court upheld a South Carolina statute on out-of-state insurance companies that imposed a tax of 3% of premiums from business done within the state as a condition of doing business within the state, without differentiating between interstate and local transactions. The tax was not imposed on South Carolina companies but the State Supreme Court had held that the tax was not discriminatory in view of other taxes imposed upon domestic corporations. *Prudential Ins. Co.* v. *Murphy*, 207 S.C. 324, 331, 355 S.E. 2d 586, 588 (1945). Without making an independent review of that determination, this Court concluded that in light of the McCarran-Ferguson Act, the South Carolina tax did not violate the Commerce Clause.

But in so holding, the Court's emphasis was to establish the power of Congress, challenged by the appellant in that case, to authorize the states to take action that, in the absence of congressional authority, might be deemed to be inconsistent with the Commerce Clause. What Congress had in fact authorized received lesser consideration. In that the Court was explicit: "It is not necessary to spend much time with interpreting the McCarran Act" (328 U.S. at 429). It was not established that the South Carolina tax in issue was in fact discriminatory, and the Court refrained from addressing that question (*id.* at 428).

Moreover, the Court did not rule upon the validity of any other state tax upon insurance companies. To the contrary, it "express[ed] no opinion concerning the

validity of any feature of these statutes not substantially identical with those of the South Carolina tax dealt with herein." Hence, the Court's decision with respect to a state premiums tax is not authoritative with respect to the constitutionality of the retaliatory taxes at issue here (*id.* at 431-432 n.40). Given this explicit disclaimer by the Court, there is no reason to believe that *Prudential Ins. Co.* v. *Hobbs*, 328 U.S. 822 (1946) and *Prudential Ins. Co.* v. *Indiana*, 328 U.S. 823 (1946), both decided summarily per curiam a week later on the authority of *Benjamin*, stand for more than the principal decision.

In sum, unlike *Prudential Ins. Co.* v. *Benjamin*, *supra*, the question in this case does not concern the scope of Congress' power to ratify state taxation of insurance companies doing business in interstate commerce. That question has long been resolved. This case involves the proper construction of the McCarran-Ferguson Act and its impact upon: (1) a retaliatory California tax that is imposed upon appellant simply because it is an out-of-state insurance company whose state of incorporation maintains a somewhat higher tax rate than California; and (2) a limitation upon the credit against its premiums tax that is imposed because it is an out-of-state corporation. We believe that the Act should not be construed to authorize California's discriminatory examples of statutory protectionism.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted.

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